



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

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**No. 876**

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ALBERT BEHRENS,

vs.

*Petitioner,*

TOM SMITH, SUPERINTENDENT, WASHINGTON STATE  
PENITENTIARY

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**BRIEF IN SUPPORT OF PETITION FOR WRIT OF  
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Point 1.

The record shows petitioner was charged by information filed in the Superior Court of King County, Washington, with the crime of "carnal knowledge" committed on or about January 24th, 1937. In May 1938, petitioner was convicted, it seems, and sentenced to the Washington State Penitentiary on three counts of an amended information which was never filed (R. 5-10). The sentence on counts I and II were suppressed by the nisi prius court (R. 11). The information was filed under favor of Sec. 2436 of the Statutes of the State of Washington; the sentence was imposed under favor of the same section as amended, and which amended statute became available June 10, 1937 (Sec. 31, Art. 2, Constitution of the State of Washington).

Under the original section children could be charged under it; under the amended section, adults only.

The reviewing court had only the sentence under count I to settle. The trial court had no jurisdiction of the petitioner at the time of the passing of sentence, and was without authority to enter the judgment of sentence. The judgment being void, the petitioner was entitled to be discharged. The return of the Superintendent of the Washington State Penitentiary shows the imprisonment illegal; the two exhibits attached to the return and made a part of such pleading show the judgment and sentence imposed pursuant to counts in an amended information which was never filed (R. 5-11). The exhibits control the recitals of the pleading.

*Clark v. Cross*, 51 Washington Reports, 231;

*Willard v. Davis*, 122 Fed. 363;

*Continental Securities v. Transit Company*, 165 Fed. 945.

The record—judgment of sentence—shows the same to be *ex-post facto* (R. 5-11). Under Section 2436, *supra* a minimum sentence of five years is provided; under the amended section life is provided for adults. The sentence is *ex-post facto*.

*Lindsey v. State*, 301 U. S. 379;

*Palmer v. McCauley*, 21 Fed. Supp. 79;

15 Am. Jur. Sec. 459—page 116—.

An agency unknown was directed to fix the minimum sentence—"The Parole Board" (R. 7). There was no such agency. The agency provided by the Statutes is the Board of Prison, Terms and Parole. Sec. 10249-1 and as amended—10249-2.

There is no such crime in the Washington statutes as carnal knowledge. If it can be construed that the amended

section of 2436, gives the court jurisdiction to sentence pursuant to a conviction under the section before it was amended, then and in which event, said amended section is found in Chap. 24 of the Laws of Washington for 1937, and the same is unconstitutional as it violates Sec. 19, Art. 2 of the State Constitution. The constitution referred to provides that no bill shall comprise more than one subject and that must be expressed in the title.

The judgment of the nisi prius court is void; the judgment of the reviewing court affirming such judgment is void.

*Ex parte Hewit*, Fed. Cas. No. 6,442;

*In re Medley*, 134 U. S. 160;

*In re Savage*, 134 U. S. 176;

*Anderson v. Denver*, 265 Fed. 3 —.

*Habeas corpus* lies where a judgment or sentence is fatally defective upon the face of the record.

*Lim v. Davis*, 75 Utah 245; 76 Am. Law Rep. 460.

Criminal statutes must be strictly construed and in the interest of life and liberty.

16 C. J. 1360, Sec. 6; 15 Am. Jur. Sec. 459.

The judgment of the Washington State Supreme Court denies to petitioner rights guaranteed under the 14th Amendment to the Federal Constitution.

Point 2.

In *Lindsey v. State*, 301 U. S. 379, it was held that an *ex-post facto* judgment of the State court was void and the judgment was open to attack. In *Palmer v. McCauley*, 21 Fed. Supp. 79, the same holding was observed.

WHEREFORE, petitioner most respectfully prays that a writ of certiorari issue herein to the Supreme Court of the State of Washington directed, commanding that Court

to certify and send to this Court for its review and determination on a day certain therein named the full and complete transcript of the record and all proceedings in this cause, and that the decision and judgment of the Supreme Court of the State of Washington may be reversed, and that your petitioner may be discharged from custody, and for such other and further relief as may be proper.

ALBERT BEHRENS,

*Petitioner,*

By HOWARD E. FOSTER,

*Attorney for Petitioner.*

(2887)

*End*

